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No. 08-453

In the
Supreme Court of the United States

ANDREW M. CUOMO,
ATTORNEY GENERAL OF NEW YORK,
Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE STATES OF NORTH CAROLINA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The States have a strong interest in preserving the system of dual sovereignty established by the Constitution. The position of the Office of the Comptroller of the Currency ("OCC") pushes the boundaries of preemption to new limits, thereby undermining the role that States play in our federal system. The OCC is seeking to displace the States from their historical enforcement role, and in so doing, to assume *sole* responsibility for enforcing state laws against national banks. Unlike the state attorneys general, the OCC has no experience in enforcing state public protection laws, has a minimal track record in consumer protection, and has no accountability to the citizens of any State.

Irresponsible lending practices by financial institutions contributed to the economic challenges our Nation faces today. The States are proud of their role in enacting legislation and bringing enforcement actions to deter misconduct on the part of the lending industry. The OCC's efforts to prevent the States and state attorneys general from pursuing these enforcement efforts directly impacts the States' ability to protect the public.

SUMMARY OF ARGUMENT

This case has ramifications far beyond the interpretation of an obscure provision in a 140-year-old federal banking statute. First and foremost, the case arises from a federal agency's attempt to interfere with a core principle of federalism – the authority of the States to enforce their own laws. The notion that a federal agency can usurp the authority of state attorneys general and claim the exclusive right to enforce a State's public protection laws seems incongruous on its face. Yet that is the position advocated by the Respondents in this case.

State legislatures have the sovereign power to enact laws for the protection of their citizens. State attorneys general have a duty to enforce those laws and are accountable to the citizens they represent. The OCC, as a federal regulatory agency, should not be permitted to override this essential function of the attorneys general by administrative fiat based on an unreasonable interpretation of a federal statute. To the extent that deference applies in this case, it should be afforded to the sovereign powers of the States, not to the turf protection policies of the OCC.

The Second Circuit's deference to the OCC pushed the *Chevron* doctrine beyond its intended and

reasonable limits.[1] This case involves substantial issues of interference with state sovereignty, which are appropriate for courts to decide, not regulatory agencies. Moreover, *Chevron* deference is not appropriate in this case given the OCC's self-interest in preempting state law.

The recent (and continuing) fallout from the subprime lending debacle demonstrates the need for more oversight and consumer protection enforcement in the area of mortgage lending. This case arose when the New York Attorney General attempted to investigate allegations of unfair and discriminatory subprime mortgage lending by banks operating in New York. However, instead of cooperating with New York's attorney general, the OCC pursued its adversarial policy toward the States by filing a lawsuit to enjoin the Attorney General's investigation.

The state attorneys general have a long track record of consumer protection enforcement. For many years, the attorneys general have conducted investigations, pursued litigation, and obtained settlements in consumer protection cases involving national banks, usually without jurisdictional controversy. Prohibiting the attorneys general from such consumer protection enforcement on the grounds

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[1] *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844-45 (1984).

that such actions constitute "visitorial powers" is erroneous as a matter of law as well as short-sighted public policy.

ARGUMENT

I. THE OCC'S PREEMPTION OF STATES' AUTHORITY TO ENFORCE THEIR OWN LAWS VIOLATES FUNDAMENTAL TENETS OF FEDERALISM.

A. The OCC Cannot Displace the Sovereign Power of the States to Enforce Their Own Non-Preempted Laws.

Respondents in this case are asserting a radical proposition – one that undermines the most basic principles of federalism. They contend that a State has no power to enforce a valid state law against a national bank, even if the bank clearly is bound by that law. According to Respondents, only the OCC, a federal regulatory agency, has the authority to enforce non-preempted state fair lending laws and to investigate potential violations of such laws. This attempt to preclude States from enforcing their non-preempted laws against federally chartered banks is a serious assault on our federal system.

It is a fundamental precept of federalism that "our citizens . . . have two political capacities, one state and one federal, each protected from incursion by the other." *Printz v. United States*, 521 U.S. 898, 920 (1997) (quoting *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). As a result, the Federal Government and each State has "its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *Id.* Accordingly, each State "has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses." *United States v. Wheeler*, 435 U.S. 313, 320 (1978). "[T]he power to create and enforce a legal code, both civil and criminal, is one of the quintessential functions of a State." *Diamond v. Charles*, 476 U.S. 54, 65 (1986) (citations omitted). Enforcement of state laws is an essential sovereign power of the States because "the power of a State to pass laws means little if the State cannot enforce them." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991).

As this Court has recognized, the Constitution "contemplates that a State's government will represent and remain accountable to its own citizens." *Printz*, 521 U.S. at 920. When the lines between state and federal responsibility are confused, "one of the Constitution's structural protections of liberty" is jeopardized. *Id.* at 921.

The OCC's claim of exclusive enforcement authority interferes with this fundamental principle of accountability. The OCC has no accountability to the citizens or elected officials of New York, let alone any interest or track record in enforcing state law. As Judge Cardamone aptly noted in his dissent from the Second Circuit's majority opinion in this case, "[b]y leaving state substantive law in place, while at the same time denying the state any role in enforcing that law, § 7.4000 [the OCC regulation at issue] erodes a key aspect of state sovereignty, confuses the paths of political accountability, and allows a federal regulatory agency to have a substantial role in shaping state public policy." *Clearing House Ass'n, L.L.C. v. Cuomo*, 510 F.3d 105, 130-31 (2d Cir. 2007) (Cardamone, J., dissenting).

In two cases that are mirror images of this one, the Court rejected the Federal Government's attempt to require States to implement and enforce federal regulatory programs.

In *Printz*, the Court struck down provisions of the federal Brady Act commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers. The Court held that forced participation of the States in the actual administration of a federal program violated the Constitution by intruding on the sovereign powers of the States. 521 U.S. at 918.

In *New York v. United States*, 505 U.S. 144 (1992), the Court held that the Tenth Amendment prohibited Congress from compelling the States to enact and enforce a federal regulatory program for radioactive waste disposal. This Court observed that state sovereignty and political accountability are impermissibly diminished "when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." *Id.* at 169.

Here, instead of commandeering the States to enforce a federal regulatory scheme, the OCC is attempting to prohibit the States from enforcing their own non-preempted laws against national banks. The OCC's action interferes with state sovereignty and the lines of accountability between the States and their own citizens no less than the federal overreaching struck down in *Printz* and *New York*.

It is a novel and extreme assertion of authority for a federal agency to claim, by its own regulation, that it has exclusive rights to enforce state law. The attorneys general, who frequently cooperate with federal authorities in investigating and prosecuting wrongdoers, are unaware of any federal agency other than the OCC that has taken the unusual step of suing a state attorney general to enjoin state enforcement of a non-preempted state law. Here, however, the OCC

chose to pursue an injunction against New York's Attorney General, rather than cooperating with his office to investigate the alleged violations of New York's anti-discrimination laws.

B. The States Have an Important Interest in Exercising Their Police Powers to Deter Abusive and Discriminatory Lending Practices.

The *amici* Attorneys General are not advocating their States' sovereign enforcement rights in this case merely because they have an academic interest in federalism. The problems of unfair mortgage lending underlying this case are matters of profound state and local concern.[2] The recent and ongoing foreclosure wave, caused in part by irresponsible subprime lending, negatively affects communities in a variety of ways, including the loss of home ownership, vacant and unmaintained housing, and a decline in property values and tax base. Predatory mortgage lending also

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[2] Predatory mortgage lending usually involves aggressive and deceptive solicitations made to unsophisticated lower-income borrowers, accompanied by abusive loan terms, such as escalating adjustable interest rates, excessive fees, and high prepayment penalties. *See generally* General Accounting Office ("GAO"), *Consumer Protection: Federal and State Agencies Face Challenges in Combating Predatory Lending*, pp. 18-19, 21-22 (2004) (hereinafter "GAO Predatory Lending Report").

has had a disproportionate effect on minority communities. *See, e.g.,* U.S. Department of the Treasury & U.S. Department of Housing and Urban Development, *Curbing Predatory Home Mortgage Lending: A Joint Report*, at 3-5, 13, 17-18, 22-23 (2000). In fact, reports of discriminatory pricing of loans made by banks to African-American and Hispanic borrowers in the New York metropolitan area precipitated the investigation by the New York Attorney General that the OCC seeks to prohibit in this case.

The States have been in the forefront of attacking predatory mortgage lending through legislative initiatives and enforcement. In 1999, North Carolina enacted the first comprehensive anti-predatory lending law in the country. *See* Act of July 22, 1999, ch. 332, 1999 N.C. Sess. Laws 1202, codified principally as N.C. GEN. STAT. §§ 24-1.1E and 24-10.2 (2009). The North Carolina legislation addressed "lending abuses that were not prohibited by federal statutes and regulations" and was supported by state officials, North Carolina's banks, and consumer groups. GAO Predatory Lending Report at 63. The legislation identified a category of "high cost" home loans and subjected those loans to significant consumer protections.[3] Since that time, at least 25

[3] The legislation was then considered essentially preemption-proof because it did not directly limit interest

States have enacted similar legislation. GAO Predatory Lending Report at 59; Julia Patterson Forrester, *Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally Supported Lenders,* 74 U. CIN. L. REV. 1303, 1319-20, (2006); Baher Azmy, *Squaring the Predatory Lending Circle: A Case for States as Laboratories of Experimentation,* 57 FLA. L. REV. 295, 301, 361-72 (2005). In recent years, most States also have enacted or strengthened laws licensing and regulating mortgage brokers and other originators of home loans.[4] And, beginning in 2006, before any federal legislation was enacted, States moved to address the problem of loans made without regard to the borrower's ability to repay and without verification of the borrower's

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rates or fees on mortgage loans. As of 1999, it was generally understood that federal law preempted the States from limiting interest charged on loans made by out-of-state national banks. *See Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.,* 439 U.S. 299 (1978)*; Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996). However, the OCC continued to move the preemption boundaries by taking increasingly aggressive preemption positions. In 2003, the OCC issued a preemption determination preempting the application of state predatory lending laws to national banks. Preemption Determination & Order, OCC Docket No. 03-17, 68 Fed. Reg. 46,264 (Aug. 5, 2003).

[4] The OCC's preemption of state supervisory authority over non-bank mortgage lending subsidiaries of national banks was upheld by this Court in *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007).

income. *See, e.g.,* N.C. GEN. STAT. § 24-1.1F (2007); Act of April 20, 2007, ch. 18, 2007 Minn. Laws 84; OHIO REV. CODE ANN. § 1345.031(B) (2009).

The States also have a record of enforcement in the area of abusive mortgage lending. In 2000, the North Carolina Attorney General obtained $20 million in consumer refunds from the Associates, a major subprime lender acquired by CitiFinancial. Richard A. Oppel, Jr., *Citigroup to Pay Up to $20 Million in Deceptive Lending Case*, N.Y. TIMES, Sept. 7, 2001. In 2004, a group of state attorneys general negotiated a settlement with Household International Corporation to resolve allegations of predatory lending practices. The Household settlement resulted in consent judgments with 50 States and provided for approximately $484 million in consumer redress and significant reforms to Household's lending practices. GAO Predatory Lending Report at 4, 28, 67. *See also Household to Pay Record Fine and Change Lending Practices*, N.Y. TIMES, Oct. 5, 2008, at C4. In 2006, the attorneys general of 49 States concluded a settlement with Ameriquest Mortgage Company that included $295 million in restitution and injunctive relief against predatory lending practices. *Ameriquest to Pay $325 Million in a Settlement over Lending*, N.Y. TIMES, Jan. 21, 2006, at C13. In 2008, Countrywide Financial Corporation reached an agreement with eleven state attorneys general that included an estimated $8 billion in loan modification and foreclosure relief to

Countrywide borrowers nationwide. Gretchen Morgenson, *Countrywide to Set Aside $8.4 Billion in Loan Aid*, N.Y. TIMES, Oct. 5, 2008, at B1. Although the investigations of these cases initially involved non-bank mortgage lenders, the Associates, Household and Countrywide all were acquired by bank holding companies affiliated with national banks (Citigroup, Inc., HSBC North America Holdings, Inc., and Bank of America, respectively).

Most recently, in a ground-breaking case, the Massachusetts Attorney General sued Fremont Investment and Loan, an out-of-state bank, contending that it made subprime home loans on unfair terms to low-income borrowers who had a limited ability to repay the loans. Finding that the loans were "presumptively unfair," the trial court granted a preliminary injunction, restricting Fremont from foreclosing on the loans. The Massachusetts Supreme Judicial Court upheld the injunction and the findings that the loans were unfair and "doomed to foreclosure." *Commonwealth v. Fremont Inv. & Loan*, 897 N.E.2d 548, 554 (Mass. 2008).

By contrast, the OCC's record of enforcing consumer protection laws against national banks has been described as "relatively lax" and "unimpressive," particularly when compared to the more vigorous enforcement efforts of state authorities. Christopher L. Peterson, *Federalism and Predatory Lending:*

Unmasking the Deregulatory Agenda, 78 TEMP. L. REV. 1, 70-74, 77-81 (2005) (hereinafter "Peterson, *Unmasking the Deregulatory Agenda*"). As subprime mortgage lending abuses became epidemic, the OCC and other banking regulators were criticized for their slow response. *See* Edmund L. Andrews, *Fed Shrugged as Subprime Crisis Spread*, N.Y. TIMES, Dec. 18, 2007, at 1; Greg Ip & Damian Paletta, *Lending Oversight: Regulators Scrutinized in Mortgage Meltdown – States, Federal Agencies Clashed on Subprimes as Market Ballooned*, WALL ST. J., Mar. 22, 2007, at A1. Former Federal Reserve Chairman Alan Greenspan has acknowledged that federal regulators lack the skills and resources to effectively police the lending industry for unlawful practices. He also observed that the primary law enforcement role in this area should be with state attorneys general. Jane Wardell, *Greenspan Defends Subprime Market*, ASSOCIATED PRESS, Oct. 3, 2007, available at www.washingtonpost.com/wp-dyn/content/article/2007/10/02/AR2007100200784.html.

Elimination of the longstanding state attorney general enforcement function inevitably would result in a diminution of consumer protections in the national banking arena. In a 2006 report, the Government Accountability Office ("GAO") surveyed state officials and found evidence that the OCC's preemption rules had "limited the actions states can take to resolve consumer issues and negatively affected the way

national banks respond to consumer complaints and inquiries from state officials." GAO, *OCC Preemption Rules: OCC Should Further Clarify the Applicability of State Consumer Protection Laws to National Banks*, p. 17 (2006). The OCC cannot be expected to fill the enforcement void left if it succeeds in forcing state attorneys general from the field. The primary mission and cultural focus of the OCC and other federal banking regulators always has been "monitoring the safety and soundness of their institutions, rather than consumer protection." Peterson, *Unmasking the Deregulatory Agenda*, 78 TEMP. L. REV at 73. The decision below will therefore serve to sweep aside the States' proven effectiveness in combating unfair lending practices by removing fifty state officials from the law enforcement arena.

II. ENFORCEMENT OF NON-PREEMPTED LAWS OF GENERAL APPLICATION BY STATE ATTORNEYS GENERAL DOES NOT CONSTITUTE VISITATION.

A. The OCC's New and Expansive Interpretation of "Visitorial Powers" Is Not Supported by the Plain Language and Past Application of the National Bank Act.

The OCC regulation at issue, 12 C.F.R. § 7.4000, ostensibly is based on the OCC's interpretation of the

visitorial powers provision of the National Bank Act ("NBA"), 12 U.S.C. § 484, enacted in 1864. The NBA provision, in pertinent part, states that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law [or] vested in the courts of justice." This provision is contained in a subchapter of the Act entitled "Bank Examinations." 12 U.S.C. §§ 481 *et seq*. The surrounding sections of the subchapter cover other matters specifically related to bank examinations, such as appointment and payment of examiners, special examinations and waivers of examination requirements. 12 U.S.C. §§ 481-83, 485-86.

The placement of the visitorial powers provision in the bank examination subchapter of the NBA (in both the 1864 and current versions of the Act) suggests that "visitorial powers" is a concept closely related to *regulatory examinations* of national banks. Such an interpretation is consistent with the OCC's primary mission of supervising national banks to ensure the safety and soundness of the national banking system. Such an interpretation also is consistent with the OCC's prior visitorial powers regulations. In its 1996 version, § 7.4000 construed visitorial powers solely with reference to conducting bank examinations and reviewing bank records. 12 C.F.R. § 7.4000(b) (1996); Rules and Regulations, OCC Docket No. 96-03, 61 Fed. Reg. 4849, 4869 (Feb. 6, 1996). And, in the 1996 rulemaking, the OCC discussed the amended § 7.4000

in a section entitled "Books and Records of National Banks" and stated that the visitorial powers provision addressed the exclusive examination authority of the OCC. 61 Fed. Reg. at 4858.

In the current version of 12 C.F.R. § 7.4000, the OCC strayed far beyond the realm of bank examinations. In the words of the Second Circuit, the OCC "expansively interpreted" the NBA provision. 510 F.3d at 109. The regulation defines "visitorial powers" to include "[e]nforcing compliance with any applicable federal or state laws" relating to banking activities. 12 C.F.R. § 7.4000(a)(2)(iv). The text expressly prohibits state officials from "inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions." *Id.* § 7.4000(a)(1). Through this expansive interpretation of visitorial powers, the OCC is taking the extreme step of barring state attorneys general from exercising any investigative or enforcement role with respect to any and all banking-related activities of national banks.

In addition, the OCC narrowly interpreted the NBA's reference to "courts of justice" and asserted that legal enforcement actions brought in the courts by state officials constitute prohibited visitation that is not covered by the courts of justice exception. This new interpretation rejects a history of over 100 years of state enforcement actions. At the District Court

stage of this case, the OCC acknowledged that its new, restrictive interpretation of the "[c]ourts of [j]ustice" exception was inconsistent with its prior interpretation of the term. *OCC v. Spitzer*, 396 F. Supp. 2d 383, 404 (S.D.N.Y. 2005). The extremism of the OCC's position is revealed in the one form of legal action it authorized state attorneys general to bring: "Under this construction of section 484, states remain free to seek a declaratory judgment from a court as to whether a particular state law applies to the Federally-authorized business of a national bank or is preempted." Bank Activities and Operations, 69 Fed. Reg. 1895, 1900 (Jan. 13, 2004). A state attorney general is unlikely to seek a preemption declaration as to the applicability of a state law when the OCC would bar it from enforcing the state law, preempted or not.

Judicial decisions also have linked the exercise of visitorial powers to bank examination and superintendence, as opposed to enforcement of public laws. In one of the first cases construing the visitorial powers provision of the NBA, the Sixth Circuit declared that a county tax assessor could compel a national bank to produce deposit records, finding that such an investigation did not constitute visitation. *First Nat'l Bank of Youngstown v. Hughes,* 6 F. 737, 740-41 (6th Cir. 1881). The court cited with favor a definition construing visitation as "inspection; superintendence; direction; regulation." *Id.* In *Guthrie v. Harkness*, 199 U.S. 148, 158 (1905), this

Court relied on *Bank of Youngstown*, stating that visitation is the "act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations." The term therefore refers to the exercise of supervisory authority to examine corporate records and to review compliance with the corporate charter and bylaws. The *Guthrie* Court also stated that the NBA's visitorial powers provision "did not . . . take away the right to proceed in courts of justice to enforce such recognized rights as are here involved." 199 U.S. at 159.

In *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924), which upheld the right of a state attorney general to enforce state law against a national bank, also involved the distinction between visitation and the general enforcement of state laws. In *St. Louis*, the Court found that Missouri was seeking to enforce a state law and was not exercising visitorial powers relating to the bank's compliance with its charter:

> The State is neither seeking to enforce a law of the United States nor endeavoring to call the bank to account for an act in excess of its charter powers. What the State is seeking to do is to vindicate and enforce its own law, and the ultimate inquiry which it propounds is whether the bank is violating

> that law, not whether it is complying with the charter or law of its creation.

263 U.S. at 660.

There is nothing in the plain language of the NBA to support the OCC's view that the Act's visitorial powers provision limits actions by state officials to enforce non-preempted state laws. The provision's specific reference to "powers . . . vested in the courts of justice" further undermines the OCC's attempt to exclude attorneys general from seeking relief in the courts for violations of non-preempted state laws. The OCC simply has stretched the definition of visitorial powers well beyond its traditional meaning in an effort to achieve the OCC's objective of preempting state enforcement against national banks.

B. State Attorneys General Do Not Exercise Visitorial Powers.

As noted above, the term "visitorial powers" refers primarily to audit and examination functions of supervisory officials. The undersigned attorneys general are not seeking to exercise such visitorial powers or to claim the right to supervise federally chartered banks.

State attorneys general are law enforcement officers who have the general duty and authority to investigate and prosecute violations of non-preempted state laws. As such, the role of attorneys general is very different from that of state banking commissioners. State banking commissioners, like their federal counterparts, license, supervise, and examine financial institutions within their regulatory jurisdictions. Unlike a banking supervisor, an attorney general does not have the authority to oversee banking operations on a routine or systematic basis. The dissent below recognized the distinction between the two roles: "The state Attorney General has not expressed an interest in analyzing national banks' activities under their national banking charter, but instead is exercising his authority under the state's police power to investigate civil rights violations being committed by New York entities in New York." 510 F.3d at 128 (Cardamone, J., dissenting).

This case therefore is distinguishable from this Court's recent decision in *Watters*, on which the court below relied. While conceding that *Watters* did not directly address the ultimate issue before it in this case, the Second Circuit majority read *Watters* to imply that investigation and enforcement by state officials could constitute visitorial authority. *Clearing House*, 510 F.3d at 116 (citing *Watters*, 550 U.S. at 14-15). But the Second Circuit's reliance on *Watters* was misplaced. *Watters* dealt with the OCC and a

preemption issue, but it did not construe the regulation at issue here and did not resolve whether *Chevron* deference should be accorded to any OCC preemption rule. In *Watters*, the question was whether operating subsidiaries of national banks have the same status as the banks themselves for purposes of a preemption analysis directly under the NBA. There was no dispute in *Watters* that Michigan's licensing and inspection requirements would constitute the exercise of visitorial powers if applied directly to national banks. *Watters*, 550 U.S. at 15.

By contrast, the preemption issue here does not concern the traditional regulatory activities of licensing, supervision and examination, but instead concerns whether a State is permitted to enforce a non-preempted state law governing discrimination in the pricing of credit. The former activities are properly deemed to be visitorial; the latter is not.

Further, there is a pertinent distinction between administrative and judicial enforcement. This distinction is recognized in the "courts of justice" exception to the limitation on visitorial powers in the NBA, 12 U.S.C. § 484. As a general rule, enforcement actions by attorneys general are conducted through the courts, not by direct administrative order as part of a regulatory regime. Actions in the "courts of justice" also provide national banks with the added insulation

of an impartial judge as protection against any improper state enforcement demands.

C. State Attorneys General Have an Established History of Non-Visitorial Enforcement of State Consumer Protection Laws Against National Banks.

State attorneys general have enforced their states laws against national banks for many years. This history of enforcement belies the OCC's contention that such enforcement constitutes the exercise of prohibited visitorial powers. The NBA's provision on visitorial powers has remained in place since 1864 and, until now, it has not been used as a device to block enforcement by attorneys general of applicable state laws. As the dissenting opinion below noted: "[V]irtually from the inception of the National Bank Act the term [visitorial powers] was not understood to preclude state enforcement of nonpreempted state laws." 510 F.3d at 129 (Cardamone, J., dissenting).

There are numerous reported cases reflecting legal actions taken by state attorneys general against national banks.[5] There have been far more consumer

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[5] *See, e.g., Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962, 966 (D. Minn. 2001)*; New York v. Citibank,*

protection cases or investigations that have resulted in settlement agreements or assurances of voluntary compliance.[6] These cases and investigations generally have been resolved without assertions by banks that the actions were visitorial or subject to the exclusive enforcement jurisdiction of the OCC. Many attorney general offices also receive and mediate consumer complaints submitted by citizens against a wide variety of businesses, including national banks. Occasionally, resolution of consumer complaints requires further investigation or more formal action, and attorneys general traditionally have proceeded without the bank or the OCC objecting to any purported intrusion on the OCC's visitorial powers.

N.A., 537 F. Supp. 1192 (S.D.N.Y. 1982)*; State v. First Nat'l Bank of Anchorage*, 660 P.2d 406 (Alaska 1982); *State v. Sgrillo*, 859 P.2d 771 (Ariz. 1993); *Attorney General v. Michigan Nat'l Bank*, 312 N.W.2d 405 (Mich. Ct. App. 1981), *rev'd on other grounds*, 325 N.W.2d 777 (Mich. 1982); *State v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516 (W. Va. 1995)*; State v. Ameritech Corp.*, 517 N.W.2d 705 (Wis. Ct. App. 1994).

[6] For example, in 2002-2003, a group of state attorneys general negotiated agreements with a series of national banks resolving issues about the banks' selling customer information to third-party telemarketers. *See* GAO, *OCC Preemption Rules: OCC Should Further Clarify the Applicability of State Laws to National Banks*, p. 20 (2006) (hereinafter "GAO Report on OCC Preemption Rules").

In some cases, in order to obtain relief for victims of fraudulent practices, attorneys general act against banking institutions not because the banks perpetrated fraud, but because they have financed suspect transactions by a retail merchant such as a home improvement contractor or car dealer. As the West Virginia Supreme Court noted in allowing that State's attorney general to maintain an action against a national bank that financed the allegedly unlawful sale of motor vehicle extended warranties:

> Logic and experience dictate that if the types of lawsuits which the Attorney General could bring under the CCPA [the state consumer protection act] did not include lawsuits against financial institutions such as the defendants, these institutions could, if unsavory, run in effect a "laundry" for "fly-by-night" retailers that seek to excessively charge their customers. Consequently, the real meaning of consumer protection would be stripped of its efficacy.

State v. Scott Runyan Pontiac-Buick, Inc., 461 S.E.2d 516, 526 (W. Va. 1995).

In other cases, attorneys general may enforce state consumer protection laws against third parties who conduct deceptive sales solicitations in affiliation

with banks. For example, in *State of Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962 (D. Minn. 2001), the Minnesota Attorney General brought suit in federal court against Fleet Mortgage Corporation (a national bank subsidiary) for deceptive telemarketing practices. The Attorney General alleged that Fleet was providing customer information and billing services to telemarketing companies who were selling memberships for purported discount buying plans. Although the telemarketing sales had nothing to do with banking services, Fleet, supported by the OCC as *amicus*, argued that only the OCC could enforce state consumer protection laws against it. The District Court rejected Fleet's motion to dismiss, holding that "[f]ederal law does not require that the OCC have exclusive enforcement over such actions." *Id.* at 966.

By a strained and novel interpretation of the visitorial powers provision of the NBA, the OCC seeks to deny this longstanding enforcement role of the attorneys general. The OCC's regulation, supported by the decision below, not only rejects years of past enforcement practice, it will have a substantial negative impact on the consumers that state attorneys general have been fighting to protect.

III. THE OCC'S INTERPRETATION OF THE NATIONAL BANK ACT'S VISITORIAL POWERS PROVISION IS UNREASONABLE AND IS NOT ENTITLED TO *CHEVRON* DEFERENCE.

A. National Banks Are Not Immune from the Application and Enforcement of State Laws.

It is well established that the historic police powers of the States are not to be preempted without a showing that this "was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). However, the Second Circuit found that the presumption against preemption does not apply in this case because the field of national bank regulation has been "substantially occupied by federal authority for an extended period of time." *Clearing House*, 510 F.3d at 113 (quoting *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314 (2005), *cert. denied*, 550 U.S. 913 (2007)). The Second Circuit majority's disregard of the presumption against preemption was error and led to further error in that court's federalism analysis, as well as in its application of the *Chevron* doctrine.

Enforcement of non-preempted state consumer protection laws, in the financial services arena and otherwise, is not a field that traditionally has been

occupied by the Federal Government. Consumer protection enforcement has long been a significant area for the exercise of state police powers. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963) (refusing to intrude upon the States' "traditional power to enforce otherwise valid regulations designed for the protection of consumers" without evidence of clear intent of Congress). While the OCC is the primary regulator of national banks, it has not occupied the field of consumer protection or fair lending enforcement.

In fact, the States' power to enforce their non-preempted laws through court actions against national banks has been recognized by this Court since the enactment of the NBA. As Judge Cardamone pointed out in his dissent, "[c]onsiderable authority supports the proposition that states have the authority to enforce such laws against national banks." 510 F.3d at 129 (Cardamone, J., dissenting). In 1869, the Court observed that national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation." *Nat'l Bank v. Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1869). In *First National Bank of Bay City v. Fellows*, 244 U.S. 416 (1917), this Court held that the Michigan Attorney General could sue a national bank in state court to enforce state antitrust laws. In *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924), the Court held that the Missouri Attorney

General could prosecute an action against a national bank to enforce a state law prohibiting branch banking. *Id.* at 659-60. The Court pointed out the absurdity of denying the State the right to enforce applicable state laws:

> [S]ince the sanction behind [the state statute] is that of the State and not that of the National Government, the power of enforcement must rest with the former and not with the latter. To demonstrate the binding quality of a statute, but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law.

Id. at 660.

In this case, the New York Attorney General is attempting to enforce a non-preempted state law against a national bank, as was the Missouri Attorney General in *St. Louis*. The OCC should not be able to interfere with New York's sovereign enforcement powers, particularly when enforcement of state fair lending laws is not an area in which the OCC has even ventured, let alone occupied. The authority of the State of New York to enforce its laws of general application against national banks should be

recognized and upheld, free from federal interference, as an inherent feature of our federalist system of government.

B. Because of the Sensitive Issues of Federalism Present in this Case, the NBA's Visitorial Powers Provision Should be Interpreted Independently by the Courts, Not by *Chevron* Deference to the OCC's Legal Analysis.

The case at bar is not the ordinary *Chevron* deference case, where neutral agency expertise is allowed to fill the gaps in a complex regulatory statute. Under *Chevron*, if there is ambiguity as to congressional intent in a statute, courts give weight to a reasonable construction of the statute by the administrative agency, as a part of the agency's "gap-filling" role. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844-45 (1984). This deference is particularly appropriate when, as in *Chevron* (which dealt with air pollution standards), the subject matter is "lengthy, detailed, technical, [and] complex." *Id.* at 848, 865; *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000) (expert agency opinion identifying conflicting state laws may be entitled to "some weight," particularly when "the subject matter is technical").

By contrast, the OCC's interpretation of the NBA provision at issue here does not merely fill some gap in the NBA; it instead makes a major legal and policy determination that intrudes on the role of the States in our federal system. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion").

It is well established that without a clear statement of congressional intent, federal agencies should not preempt States from exercising their sovereign functions. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute."). This Court has expressly declined to grant *Chevron* deference when doing so could implicate serious constitutional and federalism issues. In *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), the Court articulated an "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73. The Court went on to note that its concern "is heightened where the administrative interpretation alters the federal-state framework by permitting

federal encroachment upon a traditional state power." *Id.* at 173.

The Second Circuit acknowledged that there is no unambiguous expression of congressional intent to displace state enforcement in § 484 of the NBA. *Clearing House*, 510 F.3d at 117. The court also observed that the OCC's rulemaking lacked "any real intellectual rigor or depth" and found that there was "very little about the OCC's rather cursory analysis that, in a different context, could justify this Court's deference under *Chevron*." *Id.* at 119. Nevertheless, despite these misgivings, the panel majority considered itself bound to uphold the OCC's expansive interpretation of visitorial powers under the *Chevron* framework. Judge Cardamone was correct, however, when he stated that *Chevron* did not apply to the preemption determination at issue: "[I]t is well established that an agency's construction of a statute that upsets the usual constitutional balance between federal and state powers is never entitled to deferential review under *Chevron*." *Id.* at 131 (Cardamone, J., dissenting). The OCC's attempt to bar States from enforcing their nonpreempted fair housing and consumer protection laws unquestionably upsets the usual constitutional balance between the federal and state governments.

In accord with Judge Cardamone's position, a substantial body of recent scholarly commentary has

argued that deference to an agency's legal analysis is inappropriate when sensitive issues of federalism are involved. *See, e.g.*, Nina A. Mendelson, *Ordering State-Federal Relations Through Federal Preemption Doctrine: A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 698 (2008); Recent Cases, *Federal Preemption – Chevron Deference – Second Circuit Finds National Bank Operating Subsidiary Exempted From State Law – Wachovia Bank v. Burke*, 119 HARV. L. REV. 1598, 1601 (2006) (observing that recent scholarly literature "has called into question whether *Chevron's* rationales retain much persuasive force in preemption contexts" and noting that "when preemption issues arise, agencies lose much of their expertise advantage relative to courts"); Damien Marshall, Note, *The Application of Chevron Deference in Regulatory Preemption Cases*, 87 GEO. L.J. 263, 279 (1998) (noting that "it is highly problematic to assert that agencies have expertise in determining the proper balance between federal and state power").

Most recently, in *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007), this Court found it unnecessary to decide whether another OCC preemption regulation was entitled to *Chevron* deference and instead based its resolution of the case on the language of the statute. However, the dissenting justices in *Watters* noted that "when an agency purports to decide the scope of federal pre-emption, a healthy respect for state sovereignty calls

for something less than *Chevron* deference." 550 U.S. at 41 (dissenting opinion of Stevens, J., joined by Roberts, C.J. and Scalia, J). The issue of state sovereignty is more pronounced here than in *Watters*. The OCC is seeking to usurp the States' power to enforce their own non-preempted laws and to claim for itself the sole authority to enforce such laws. In the States' view, no deference is owed to a federal agency making such a radical attempt to interfere with the inherent powers of the States.

C. The OCC Is Not Entitled to *Chevron* Deference in This Case Because of Its Self-Interest in Preempting State Law.

The OCC regulation at issue here is just one facet of an ongoing campaign by the OCC to use its regulatory and rulemaking authority to substantively preempt state consumer protection laws as well as state enforcement of those laws.[7] The OCC's self-

[7] Over ten years ago, Congress expressed concerns about the OCC's preemption initiatives. In enacting the Riegle-Neal Banking and Branching Efficiency Act of 1994, the conferees on the bill noted: "During the course of consideration of this title, the Conferees have been made aware of certain circumstances in which the Federal banking agencies have applied traditional preemption principles in a manner the Conferees believe is inappropriately aggressive resulting in preemption of State law in situations where the federal interest did not warrant

interest in protecting its constituent banks, not disinterested statutory analysis, apparently is driving the OCC's position on visitorial powers.

For example, when States were enacting predatory lending laws to curtail the worst abuses of subprime mortgage lending, the OCC fought to protect its constituent national banks from having to comply with those laws. In 2003, in response to a request from national bank-related subprime lenders, the OCC issued a Preemption Determination and Order, preempting Georgia's Fair Lending Law, Ga. Code Ann. §§ 7-6A-1, *et seq*. *See* OCC Docket No. 03-17, 68 Fed. Reg. 46,264 (Aug. 5, 2003). The Preemption Determination was generally critical of state predatory lending laws and found that in all aspects, the Georgia law (and, by implication, all similar state laws) impermissibly interfered with the lending authority of national banks and their subsidiaries. The OCC went beyond traditional national banking preemption areas, such as restrictions on interest rates and loan fees, and preempted even widely accepted and minimally burdensome consumer protections on high cost home loans. The OCC specifically found that the following provisions aimed at policing high cost loans impermissibly obstructed or impaired the lending ability of national banks: restrictions on negative

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that result." *See* H.R. Rep. No. 103-651, at 53 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074.

amortization and balloon payments; limitations on acceleration without default; restrictions on loan "flipping"; requiring borrower counseling before a high-cost loan could be consummated; and a prohibition on the practice of encouraging borrowers to default on their existing loans. OCC Docket No. 03-17, 68 Fed. Reg. 46,264, 46,276-78 (Aug. 5, 2003).

In 2003, the OCC proposed sweeping regulations that preempted virtually all state consumer protection laws relating to national bank loans, under the theory that such consumer protections "obstruct, impair or condition" banks' ability to engage in federally authorized lending activities. Bank Activities and Operations; Real Estate Lending and Appraisals, OCC Docket No. 03-16, 48 Fed. Reg. 46,119 (Aug. 5, 2003). All fifty state attorneys general submitted comments in opposition to the OCC's proposed preemption rules.

The attorneys general noted that the OCC "has zealously pushed its preemption agenda into areas where the states have engaged in enforcement and regulatory activity without controversy for years." Comments of Attorneys General of 50 States (Oct. 6, 2003), p. 1, OCC Docket No. 03-16, reprinted in *Congressional Review of OCC Preemption: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 108th Cong. 108-09 (2004) at 102-19. The attorneys general also pointed out that even as the OCC was taking a

wrecking ball to state predatory lending laws, it had proposed only minimal restrictions on the subprime lending activities of national banks and their mortgage lending subsidiaries. *See generally* Robert Berner & Brian Grow, *They Warned Us*: *The Watchdogs Who Saw the Subprime Disaster Coming – and How They Were Thwarted by the Banks and Washington*, BUS. WK., Oct. 9, 2008, at 36 (OCC brushed aside concerns of state attorneys general about reckless and abusive mortgage lending practices); Jess Bravin & Paul Beckett, *Friendly Watchdog: Federal Regulator Often Helps Banks Fighting Consumers – Dependent on Lenders' Fees, the OCC Takes Banks' Side Against Local, State Laws*, WALL ST. J., Jan. 28, 2002, at A1 (OCC frequently has intervened on behalf of national banks and their subsidiaries when consumer rights are at stake). Nevertheless, the preemption regulations were adopted in early 2004 and codified as 12 C.F.R. §§ 34.4 and 7.4008 (d).

The OCC issued its visitorial powers rule preempting state enforcement in January 2004, at the same time it announced its rule substantively preempting state consumer protection laws. Forty-five state attorneys general filed comments in opposition during the rulemaking process, contending that 12 C.F.R. § 7.4000, as proposed, "exceeds the scope of Congressional authority, misinterprets the National Bank Act, and reflects a change in the OCC's historic position." Comments of Attorneys General of 45 States

(Apr. 8, 2003), p. 1, OCC Docket No. 03-02, reprinted in *Congressional Review of OCC Preemption: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 108th Cong. 108-09 (2004) at 120-35.

The OCC's preemption initiatives "are widely viewed by commentators as serving the interests of big, multistate national banks." *See* Arthur A. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority*, 23 ANN. REV. BANKING & FIN. L. 225, 276 (2004). The OCC has a "strong incentive" to persuade major banks to retain or convert to national charters because the OCC's budget is almost entirely funded by fees paid by national banks. *Id.* By promoting a regime of *de facto* field preemption for national banks, the OCC is "clearly encouraging large multistate banks to select national charters for the purpose of avoiding the application of state laws, except for those helpful state laws that 'support[] the ability of national banks . . . to do business.'" *Id.* at 276-77. Former Comptroller of the Currency John D. Hawke, Jr., has acknowledged that the OCC's power to override state consumer protection laws is an incentive for banks to seek chartering under the OCC. Bravin & Beckett, WALL ST. J., January 28, 2002, at A1.

The OCC's unabashed self-interest in preempting state law in order to attract large national banks to its constituency should be a significant factor in weighing

the degree of deference owed to the OCC under *Chevron*. Such self-interested rulemaking is not the kind of impartial and disinterested agency consideration contemplated under *Chevron*. *See* Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 265 (2004) (observing that the *Chevron* approach "presupposes that the agency's interpretation represents an impartial and disinterested exercise of its interpretative authority"); Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1009 (1999) (maintaining that agency interpretations of statutes that implicate "agency self-interest" – either by advancing the agency's financial interests or by expanding the scope of its regulatory powers – should not receive *Chevron* deference and should be reviewed *de novo* by the courts); Cass R. Sunstein, *Law and Administration after Chevron,* 90 COLUM. L. REV. 2071, 2101 (1990) (contending that it would be "peculiar" to defer to agency views where there is a likelihood of agency bias and self-dealing).

Judicial deference to the OCC's interpretation of the NBA's visitorial powers provision is particularly inappropriate where agency bias is apparent on multiple grounds. The OCC has exhibited an aggressive policy favoring preemption of state consumer protection laws; it has a financial self-interest in protecting the national banks that pay the

OCC's operating costs; and it has an interest in expanding its own claim of unitary authority by displacing state enforcement. For these reasons alone, *Chevron* deference should not be applied to the OCC regulation at issue in this case.

CONCLUSION

The decision of the United States Court of Appeals for the Second Circuit should be reversed.

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